JD(SF)–18–12
Oakland, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS

and Case 32–CA–63475

SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS–WEST

Noah Garber, Esq. and *Amy L. Berbower, Atty*.,
for the Acting General Counsel.

David S. Durham, Esq. and *Gilbert J. Tsai, Esq*.,
(*Arnold & Porter LLP)* of San Francisco, California,
for the Respondent.

Yuri Gottesman, Esq., (*Weinberg, Roger & Rosenfeld)*
of Alameda, California, for the Charging Party.

DECISION

Statement of the Case

Gerald M. Etchingham, Administrative Law Judge. This case was tried in Oakland, California on January 31, 2012. Service Employees International Union, United Healthcare Workers–West (the Union or Charging Party) filed the charge on August 26, 2011[1] and the General Counsel issued the complaint on November 22. This is a refusal to provide information case by the Union against American Baptist Homes of the West d/b/a Piedmont Gardens (Respondent or Employer) where it is alleged that Respondent has violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et. seq*. (the Act).

[1] All dates are in 2011 unless otherwise indicated.

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs.[2] On March 6, 2012, said briefs were filed by counsel for the Acting General Counsel, in which counsel for the Union joined and argued separately in its own brief, and by counsel for Respondent and have been carefully considered. Accordingly, based upon the entire record[3] herein, including the post-hearing briefs and my observation of the credibility of the several witnesses, I make the following:

FINDINGS OF FACT

A. Earlier ALJ Decision and Background Procedural Matters

This case follows on the heels of another trial involving these same parties that was conducted by now-retired Administrative Law Judge Burton Litvack last year and is pending before the Board. See *Piedmont Gardens*, Cases 32–CA–25247, 32–CA–25248, 32–CA–25266, 32–CA–25308, and 32–CA–25498, slip op. (August 9, 2011)(the earlier decision). I adopt and take administrative notice of Judge Litvack's credibility findings with respect to Respondent's Executive Director, Gayle Reynolds, Respondent's witness who testified in both proceedings. Retired Judge Litvack found Ms. Reynolds' testimony, in part, to be unbelievable, disingenuous, and outweighed by more reliable testimony.[4] Thus, I find that Judge Litvack's credibility findings as to Gayle Reynolds in the earlier decision are relevant and shall be adopted by me in this proceeding so that her testimony here will receive less weight unless substantiated by other evidence. Accordingly, my reliance on Judge Litvack's credibility findings in the earlier

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[2] For ease of reference, testimonial evidence cited herein will be referred to as "Tr." (Transcript) followed by the page number(s); documentary evidence is referred to either as "GC Exh." for a General Counsel exhibit, there are no exhibits from Respondent or Charging Party; and reference to the General Counsel's post-trial brief shall be "GC Br." for the General Counsel's brief, followed by the applicable page numbers; and the same for Respondent's post-trial brief referenced as "R Br." and Charging Party's post-trial brief shall be "CP Br." I reject Respondent's March 22, 2012 letter submission citing to the recent *Alcan Rolled Products*, 358 NLRB No. 11 (February 27, 2012), case on the grounds that it is untimely, improper, and irrelevant. As discussed in this decision, the case is distinguishable from the instant action.

[3] I hereby correct the transcript as follows: Tr. 50, line 18: "case" should be "cause"; Tr. 55, line 5: "would confidential" should be "would be confidential"; Tr. 58, line 13: "Durham" should be "Garber". The referencing errors between Mr. Garber and Mr. Durham continue from Tr. pages 59-63 until cross-examination as Mr. Garber conducted his direct examination of Ms. Hutton; Tr. 94, line 2: "periods, throughout" should be "periods. Throughout ….".

[4] "… While she professed to have no knowledge as to the vote, Gayle Reynolds admitted entering the breakroom sometimes on a weekly basis and having observed other bargaining-related flyers posted on the bulletin board. In these circumstances, I do not believe that she failed to notice the strike vote flyer affixed to the bulletin board and believe that Pinto entered the breakroom and engaged in his actions at Respondent's behest."

"…As to Henry, as between the employee and Reynolds, I perceived Henry as being the more reliable witness. In other circumstances, I might have believed Reynolds merely was honestly mistaken in maintaining she acted against Henry's presence inside Respondent's facility on the morning of June 18; however, *when, despite being confronted with her own conflicting emails*, *she obdurately insisted her testimony was correct, I think Reynolds was being disingenuous.* Thus, I credit Henry and find that Reynolds discovered her helping with the strike authorization vote in the breakroom after 6:00 p.m. on June 17 and promptly demanded that Henry leave the building. Finally, in these circumstances, and again noting her own conflicting email, I find that Reynolds expelled Eastman from Respondent's facility on the morning of June 18, also because she helped with the strike authorization vote." The earlier decision at 19-20. (Emphasis added.)

decision is limited to witness Gayle Reynolds.[5] See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-95 (1995), enfd. mem., 215 F.3d 1327 (6th Cir. 2000) (Judge's findings in earlier case relied upon as showing evidence of animus in present case); *Detroit Newspapers Agency*, 326 NLRB 782 n. 3 (1998), enfd. denied, 216 F.3d 109 (D.C. Cir. 2000) (Judge properly relied on earlier decision of another judge in a case pending before the Board to find that a strike was an unfair labor practice strike); *Sunland Construction Co., Inc*., 307 NLRB 1036, 1037 (1992) (Administrative notice appropriate where factual showing that key management witness in earlier case whose actions gave rise to an unfair labor practice was the same individual involved in the subsequent matter.)

B. Jurisdiction

At all times material herein, Respondent, a State of California non-profit corporation, has been engaged in the operation of continuing care retirement communities, including a facility located in Oakland, California, known as Piedmont Gardens and a separate facility also located in Oakland known as Grand Lake Gardens. The evidence establishes, the parties admit, and I find that during the 12-month period immediately preceding the issuance of the instant consolidated complaint, which period is representative, Respondent, in the normal course and conduct of its above-described business operations, derived gross revenues in excess of $100,000 and purchased and received goods and services, valued in excess of $5000, which originated outside the State of California. It is alleged, the parties admit, and I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint further alleges, the parties admit, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

C. Background Facts

It is further alleged, the parties admit, and I find that at all times material, certain employees of Piedmont Gardens and certain employees of Grand Lake Gardens, namely all employees performing work described in and covered by "Section 1. Union, 1.1 Recognition" of the March 1, 2007 through April 30, 2010 collective bargaining agreement between Piedmont Gardens and Grand Lake Gardens and the Union, herein called the Agreement; excluding all other employees, guards, and supervisors as defined in the Act, herein called the Combined Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Since at least March 1, 2007, and at all times material, the Union has been the designated exclusive collective bargaining representative of the employees in the Combined Unit, and since that date the Union has been recognized as such representative by Respondent. This recognition was embodied in the Agreement.

[5] Union representative, Ms. Mapp, Respondent's counsel, Mr. Durham, Esq., and terminated employee Mr. Arturo Bariuad are also referenced in the earlier decision but Mr. Bariuad did not testify and retired Judge Litvack did not make any other credibility findings in his case for Ms. Mapp or Mr. Durham relevant to this proceeding.

At all times, since at least March 1, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Combined Unit. Donna Mapp (Ms. Mapp) is a Union representative assigned to Respondent's facility, Piedmont Gardens, whose job is to monitor compliance with the Union contract with management and to provide assistance to Union members through the grievance process. (Tr. 27.) Ms. Mapp testified that she understands that the Union represents the Combined Unit that is comprised basically of certified nursing assistants (CNA's) dietary workers, housekeeping workers, maintenance workers, the receptionist, and laundry activities' workers but not the licensed vocational nurses (LVN's) including charge nurses. (Tr. 28, 81-82.) Ms. Mapp is familiar with former Respondent CNA Arturo Bariuad (Mr. Bariuad) who was terminated by Respondent for alleged misconduct resulting in Ms. Mapp's filing of a June 17 grievance related to Mr. Bariuad's termination. (Tr. 28-29; GC 5.)

The parties further admit, stipulate to, and I find that Respondent's Acting Human Resources Director at its Piedmont Gardens facility, Lynn M. Morgenroth, is a supervisor of Respondent, within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Furthermore, the parties admit, stipulate to, and I find that Respondent's Assisted Living Director at its Piedmont Gardens facility, Alison Tobin (Director Tobin), is a supervisor of Respondent, within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 9-10, 80.) Director Tobin reports to Respondent's executive director Gayle Reynolds. (Tr. 86.)

Piedmont Gardens is a continuing care retirement community of more than 300 residents providing entire continuum care from independent living, assisted living, memory support, and skilled nursing care. (Tr. 86-87.) Of Respondent's three building campus, its assisted living portion is located in the Oakmont Building on its 8th, 9th, and 10th floors as of last June. (Tr. 87.) Respondent has approximately 34-37 residents in its assisted living section. (Tr. 88.)

Residents at Respondent's assisted living section generally require assistance with their activities of daily living including dressing, bathing, getting to the dining room, and taking their medications. (Tr. 87.)

D. Events Leading to the Creation of the Witness Statements

In June, Mr. Bariuad's employment as a CNA at Respondent was terminated for allegedly sleeping on the job during his nightshift in Respondent's assisted living facility. (Tr. 44.) Soon after the alleged incident involving Mr. Bariuad, Director Tobin participated in an investigation into the alleged incident and received five written statements from two LVN charge nurses, Mr. Bariuad, and one other CNA who observed Mr. Bariuad's alleged misconduct.[6] (Tr. 80-81, 83, 90.) While Director Tobin explained that she would expect a charge nurse to report threatening behavior and to include in any written statement to her an allegation of intimidating behavior if related to any alleged employee misconduct, no credible evidence of any threatening or intimidating conduct attributed to Mr. Bariuad was produced. (Tr. 81.)

[6] At the time of trial, only one of the two charge nurses, Lynda Hutton, was still employed at Respondent. Tr. 82-83. Also, as discussed hereafter, Ms. Hutton prepared two statements due to her clarifying dates from her first statement to her second and statements also came from an unidentified LVN charge nurse, CNA Burns, LVN Hutton, and also Mr. Bariuad.

Director Tobin began her investigation when she first met with a new unidentified charge nurse[7] who was being trained by Ms. Hutton, the other charge nurse on duty the night of the alleged incident. (Tr. 60, 99-100.) As part of her investigation, Director Tobin told the charge nurse that statements from employees are held as confidential documents and that the information was to be used internally at Respondent. (Tr. 99.) At no time prior to agreeing to prepare a statement, however, did the LVN charge nurse express any concern about Mr. Bariuad knowing that she had written a statement about him and this LVN charge nurse did not request assurances of confidentiality. (Tr. 83, 103.) While the practice of keeping employee statements confidential is not posted at Respondent, the practice is maintained regardless of whether it is actually needed. (Tr. 90, 92.)

Ruth Burns (CNA Burns) also testified by subpoena that she formerly worked for Respondent at Piedmont Gardens' assisted living facility from August 2010 until October 2011 as a nightshift CNA and knew Mr. Bariuad who also worked the same nightshift location for Respondent. (Tr. 48-49, 52.) CNA Burns explained that Respondent's CNA's take care of senior citizen residents who live at the facility by answering their call pendants if they call and seek assistance, helping them with their showers and dressing activities, and assisting with other activities of daily living. (Tr. 54.) CNA Burns further explained that when she worked the nightshift, there was usually one other CNA and a charge nurse or LVN working a floor with her. (Tr. 54, 88.) CNA Burns opined that everyone who worked the nightshift knew that Mr. Bariuad regularly slept on the nightshift. (Tr. 53.) LVN charge nurses and not CNA's were responsible for issuing and administering the residents their medications. (Tr. 54, 57, 87.) Director Tobin added that the supervising charge nurse is also responsible for responding to a resident's pendant or wall-mounted call button during the nightshift so that on the night of the alleged incident, at least one charge nurse and one CNA other than Mr. Bariuad were available to respond to any emergency on the floor where they were assigned. (Tr. 96-98.)

In June, CNA Burns was asked by her supervisor, Director Tobin, via telephone, to write a statement documenting any times that she noticed Mr. Bariuad sleeping on the job. (Tr. 49-50, 80, 101-02.) Director Tobin also asked CNA Burns to put the statement under Director Tobin's office door when she finished writing it. (Tr. 50.) At no time did CNA Burns ask Director Tobin or anyone else at Respondent to keep the written statement or her identity as a witness confidential though Director Tobin told CNA Burns that the statement would be confidential. (Id.) CNA Burns believed that "it helped" and that she "was glad" that Director Tobin told her that her witness statement would be confidential. (Tr. 55.) At no time did CNA Burns ever say to Director Tobin or anyone else at Respondent that she was scared to put anything in writing that would cause repercussions from either Mr. Bariuad or the Union. (50-51.) Similarly, Director Tobin explained that the unidentified LVN charge nurse not being Lynda Hutton on duty the night of the alleged incident, not being Lynda Hutton, also did not express any concerns about Mr. Bariuad knowing that she gave Director Tobin a written statement about the incident. (Tr. 83.)

Further testifying at trial was Lynda Hutton (Ms. Hutton), a Respondent employee for 40 years, the last two or three years being assigned as an LVN charge nurse in Respondent's assisted living facility. (Tr. 57.) Ms. Hutton opined that her duties as an LVN charge nurse in the assisted living section include supervision of CNA's, medication, treatments, and to report employee misconduct such as sleeping on the job.[8] (Tr. 57, 62, 71, 81, 94.) She also described

[7] Testimony at trial identified the LVN charge nurse in training with Ms. Hutton as Barbara Berg.

[8] The assisted living section with its 34-37 residents is distinguishable from the independent living section at Respondent's facility with close to 200 residents which allows independent living and little or no assistance or nursing supervision for residents versus intensive care unit (ICU) or skilled nursing sections

Continued

her supervisory duties as "making the rounds to make sure that people are doing what they're suppose to be doing …", instructing CNA's on their tasks, and reporting employee misconduct and writing a statement about what they witness. (Id.) Ms. Hutton admitted knowing that Mr. Bariuad was an employee at Respondent who worked the nightshift with her as his supervisor for close to two years. (Tr. 58-59, 62, 67.) Ms. Hutton did not hesitate to verify that over this almost two year time period, there was no incident involving Mr. Bariuad physically threatening either Ms. Hutton or threatening anyone else at Respondent. (Tr. 62.) Later on cross-examination, however, after a short break, Ms. Hutton altered this testimony to say that she did actually experience intimidation or threats from Mr. Bariuad through his alleged and undocumented statement that if she did anything to take Mr. Bariuad out of his employment with Respondent, he supposedly threatened to "take [Ms. Hutton] out of here with me and everybody else" and that he also allegedly threatened Ms. Hutton with closing down Respondent's facility. (Tr. 64.)

I find Ms. Hutton's first response - denying there being any threats from Mr. Bariuad - to be the more credible statement. Throughout the two years she worked the nightshift with Mr. Bariuad, she did not know of any time that Mr. Bariuad ever threatened anyone at Respondent's facility. (Tr. 62.) Ms. Hutton did not hesitate with this response. I further find that threatening conduct is the same as intimidating conduct as to intimidate is "to inhibit or discourage by or as if by threats."[9] In addition, I reject Ms. Hutton's changed testimony that she felt intimidated by Mr. Bariuad and his described intimidating statements referenced above due to its contradiction of her earlier testimony and the timing of the changed testimony directly after a trial break and a change to questioning from Respondent's lawyer.

In addition, her changed testimony is inconsistent with the record as no documentation of this alleged intimidating conduct from Mr. Bariuad was ever produced in support thereof, though requested by the General Counsel. (Tr. 78.) Ms. Hutton is required to document employee misconduct including threats and intimidating statements yet no such documentation exists. (Tr. 81.) Moreover, the parties stipulate to, and I further find, that Respondent did not have possession or control and, therefore, did not produce any documentation that relates in any way to any alleged disciplines, warnings, written memorials of verbal warnings, etc. that refer to alleged complaints received by Respondent, from its employees, regarding Mr. Bariuad's conduct with other employees while employed at Respondent. (Tr. 78.)

Ms. Mapp provided in a forthright, direct, believable manner, corroborated testimony that no employees at Respondent's facility ever expressed fear or told her they felt intimidated for any reason regarding Mr. Bariuad. (Tr. 41.) Ms. Mapp and CNA Burns also admitted that no employees at Respondent's facility ever complained to them that Mr. Bariuad ever threatened to sue them. (Tr. 42, 49.) In addition, Ms. Mapp admitted that in her role as the Union representative who provides help to those employees who have been disciplined by Respondent, she did not know of any occasion where Mr. Bariuad had been disciplined for bullying or any other form of threatening or intimidating behavior. (Id.) CNA Burns also admitted that Mr. Bariuad never threatened her in any way when she was employed at Respondent and CNA Burns also was never told by any employee at Respondent that they were intimidated by Mr. Bariuad. (Tr. 49.) At no time has CNA Burns had any communications with the Union concerning Mr. Bariuad and allegations that he was sleeping on the job. (Tr. 52.)

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with approximately 70 residents a day which provide its residents with other LVN's and registered nursing care and supervision. Tr. 93-95.

[9] *Webster's II New Riverside Univ. Dictionary,* The Riverside Publishing Co., (1988), p. 639.

In June, Ms. Hutton prepared a written statement on her own for Respondent regarding Mr. Bariuad's alleged misconduct without anyone at Respondent asking her to prepare such a statement. (Tr. 58-59.) Ms. Hutton explained how she came to draft the written statement describing how another employee had reported Mr. Bariuad and that at that point Ms. Hutton could not let Mr. Bariuad's alleged practice of sleeping on the job go any further so she reluctantly believed she needed to also report him. (Tr. 59-60.) Moreover, Ms. Hutton admitted also receiving a disciplinary write-up for not reporting Mr. Bariuad's alleged misconduct sooner. (Tr. 62.)

Ms. Hutton also recalled that she was training another LVN, Barbara Berg (Ms. Berg), at the time of the June incident involving Mr. Bariuad but she was not sure whether she consulted Ms. Berg in her preparation of the written statement. (Tr. 60.) Ms. Hutton was sure that no one from Respondent told her that her first written statement would be confidential prior to her writing it. (Tr. 60-61.) Ms. Hutton never mentioned ever being specifically told by Respondent beforehand that her statement would remain confidential but she had the belief that her *statement* would be kept confidential by Respondent after she submitted to Director Tobin. (Tr. 65.) Ms. Hutton, however, did not testify that she ever held the belief that her *identity* as a witness in Respondent's investigation would also remain confidential. Ms. Hutton further explained that she slipped her written statement about Mr. Bariuad's alleged misconduct under the door of Director Tobin's office when she finished writing it. (Tr. 60.) One or two days after preparing her written statement, Ms. Hutton was asked to clarify the date of the alleged incident involving Mr. Bariuad in her second written statement to Director Tobin. (Tr. 69-72, 102-03.)

Ms. Hutton also confirmed that Mr. Bariuad's alleged sleeping during his night shift did not pose a danger to the Respondent's residents because three other workers, including her, were covering his floor at the time of the incident.[10] (Tr. 68-69.)

E. Union's Requests for Information and Employer's Responses

After reviewing the four witness' written statements, Respondent terminated Mr. Bariuad in June for allegedly sleeping on the job.[11] (Tr. 28, 44-45, 98-99.)

When first alerted of Mr. Bariuad's termination of employment, Ms. Mapp for the Union tried to find out for the Union who was working with him the night he was accused of sleeping on the job and who might have witnessed him that night and none of the employees interviewed by the Union said they had been interviewed by Respondent about the incident. (Tr. 44-46.) Ms. Mapp admitted finding out who was working with Mr. Bariuad the night he was accused of sleeping on the job and identified one as another nightshift CNA but did not recall the specific names of the workers at trial except to note that "Rhonda" was not one of them discovered by her or mentioned by Mr. Bariuad. (Tr. 45-47.) While the Union discovered the names of some of Mr. Bariuad's co-workers with him the night of the incident, the known co-workers denied

[10] Ms. Reynolds opined, however, that if residents in Respondent's assisted living section are neglected, there could be potential negative ramifications if someone fell and was injured and no one responded. Tr. 87-88. I find this testimony to be self-serving in her position as Respondent's executive director and speculative and unreliable given Ms. Reynolds' non-credible testimony in the earlier decision and Ms. Hutton's uncontroverted view that on the nightshift in question there was no danger to the Respondent's residents because other workers were covering the floor for Mr. Bariuad at the time of his alleged misconduct. See Tr. 68-69.

[11] Besides statements from CNA Burns, Ms. Hutton, and LVN charge nurse Berg, a fourth statement from Mr. Bariuad is referenced as being produced to the Union from Respondent as part of his HR file. See GC Exh 7.

providing witness statements to Respondent so Ms. Mapp looked to Respondent to supply the missing identities and witness statements as they may have included residents at the assisted living facility. (Tr. 45-47.) Ms. Reynolds pointed out that the identity of those employees by name and assigned shift including who worked the nightshift with Mr. Bariuad was admittedly not confidential and was in fact posted in public view by the time clock in the assisted living section for a two-week period. The posting is removed when the two-week period is over and the posting is replaced with the next two-week posting prior to the next two-week shifts. (Tr. 91-93.)

Prior to filing the grievance related to Mr. Bariuad's termination, Ms. Mapp sent an e-mail on June 15 to Respondent's Human Resources director, Lynn Morgenroth, requesting information in regards to Mr. Bariuad's termination (the First Request). (Tr. 29-31; GC 6.) The First Request included, among other things, a request for witness statements and the names and job titles of everyone involved in Respondent's investigation leading to Respondent's termination of Mr. Bariuad. (Id.) Ms. Mapp explained that this information was needed because the Union was told that Mr. Bariuad had been terminated for allegedly sleeping on the job and that some people gave statements to Respondent so the Union wanted to know the identity of the people who gave statements that led to Mr. Bariuad's employment termination to verify the truth of the statements.[12] (Tr. 31, 33.)

In response to the First Request, Ms. Mapp received a three-page document dated June 17 from Ms. Morgenroth (the First Response) which, among other things, states that:

> *The employer conducted a confidential internal investigation regarding the allegations, as such disclosures of this information would breach witness confidentiality. The Grievant (whom you [the Union] represent) was present when the incident(s) occurred, so you already have this information. The law does not require that we provide you with witness statements collected during our investigation. See,* Anheiser-Busch*, 237 NLRB 982 (1978); Fleming Companies, Inc., 332 NLRB 1086 (2000); Northern Indiana Public Service Company, 347 NLRB No. 17 (2006). However, the Company [Respondent] would like to work with the Union regarding an accommodation to disclosure. Mr. Bariuad's statement is included in his HR file, attached.* (Emphasis in original.)

(Tr. 31-32; GC 7.) The First Response also provided that "*[t]he investigation was conducted by: Alison Tobin, Director of Assisted Living and Memory Support in consultation with Lynn Morgenroth, Acting HR Director*" (Id.)

On June 17, Ms. Mapp filed a grievance over Mr. Bariuad's termination and also sent a second email request for information to Ms. Morgenroth (the Second Request) repeating the Union's initial requests for the same witness names and witness statements along with an alternative accommodation to move the grievance process along suggesting that in place of providing the requested witness statements, Respondent "mak[e] all such witnesses available for the Union to interview independently as a part of our [the Union's] investigation at a time of mutual convenience in the next 2 weeks." (Tr. 29, 34-35; GC Exh. 5 and 8.) Ms. Mapp further acknowledged that at no time did Ms. Morgenroth agree to Ms. Mapp's suggested alternative accommodation on the Union's behalf. (Tr. 36.)

[12] At the time of trial, the grievance filed by the Union on Mr. Bariuad's behalf was ongoing and had progressed to a second step. (Tr. 33-34.)

In response to the Second Request, Ms. Mapp received a two-page document dated June 21 from Ms. Morgenroth (the Second Response) which, among other things, states that:

> As stated in my letter dated June 17, 2011, we [Respondent] would like to work with the Union regarding an accommodation to disclosure of the witness statements; however what you have proposed is unacceptable. While we are not required to do so, we would however consider as an accommodation providing you with a summary of the witness statements without identifying the witnesses by name. Please let me know if this is agreeable to you."

(Tr. 35-36; GC 9.) Ms. Mapp explained that a summary of witness statements was not agreeable as an accommodation to the Union because the identity of the witnesses themselves was needed to verify the accuracy of their statements and the underlying facts leading to Mr. Bariuad's termination. (Tr. 31, 33, 36-37.) Nonetheless, it is further stipulated and I further find that the Union never received the summaries of witness statements that Ms. Morgenroth offered to provide the Union as an accommodation. (Tr. 38-39.) Moreover, I further find that the Union never accepted Respondent's offer to provide witness statement summaries.

Ms. Mapp met with Ms. Morgenroth in her office approximately a week after the Second Response and Ms. Mapp revisited the Union's two requests for information and ways to resolve the impasse and Ms. Morgenroth maintained the Respondent's position that it would not disclose the witness names and had turned over the only witness statement that it was going to turn over – the grievant's, Mr. Bariuad's, statement. (Tr. 37.)

In sum, the parties further admit, stipulate to, and I further find that on June 15 and 17 by e-mail (GC Exh. 6 and GC Exh. 8) the Union by Ms. Mapp requested information from Respondent that Respondent provide the Union with the names of witnesses who provided statements in connection with Respondent's investigation that led to the termination of Mr. Bariuad and the statements those witnesses provided to Respondent as part of that investigation, herein called the Witness Names and Witness Statement, respectively.

Ms. Mapp also pointed out that also in 2011, the Union previously filed charges against Respondent for withholding the names of strike replacements and that retired Judge Litvack, in the earlier decision, ordered Respondent to provide the Union with this information. (Tr. 39-41.) Respondent, without evidence, similarly claimed it had a legitimate and substantial interest in keeping the names of striker replacements confidential.

It is stipulated and I find that the Respondent obtained a total of four written statements from three employee witnesses regarding the alleged conduct of former employee Arturo Bariuad.[13] (Tr. 10-11.) The parties also stipulate and I find that the only subject addressed in all four witness statements pertain to the witnesses having seen Mr. Bariuad sleeping while on duty - the statements do not indicate whether the employees requested or were provided assurances of confidentiality from Respondent or whether the witnesses fear retaliation from the Union or Mr. Bariuad. (Id.)

It is alleged that the requested information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of Respondent's employees in the Combined Unit and that the requested information is necessary for the Union to process Mr. Bariuad's grievance. (Tr. 39.) It is also stipulated that the Respondent has not

[13] It is believed that Mr. Bariuad also provided Respondent with a written statement. See GC Exh. 7.

provided the Union with the requested Witness Names or Witness Statements in response to the Union's June 15 and June 17 information requests. (Tr. 10-11, 36.)

ANALYSIS

A. Credibility

I have outlined my credibility findings in the findings of fact above and in the analysis below. I reject Respondent executive director Gayle Reynolds' testimony as it is self-serving to Respondent's side of the case, far removed from firsthand relevance, and is inconsistent with the record in that no credible evidence was produced showing that anyone was ever threatened or harassed by Mr. Bariuad or that he had any threatening or harassing tendencies. In addition, Ms. Reynolds' credibility was impeached in the earlier decision by retired Judge Litvack who found her to be disingenuous. Furthermore, I decline to find as credible Ms. Reynolds' testimony about Respondent's alleged unwritten policy to maintain the confidentiality of *witness names, job titles, or identities* without any corroborating evidence. I accept the testimony of Ms. Reynolds, CNA Burns, Ms. Hutton, and Director Tobin that Respondent maintains a non-posted practice of representing to its employees at investigations of employee misconduct that its witness statements will be kept confidential regardless of the subject matter or whether the practice is necessary. (Tr. 50, 55, 65, 90, 92, 99.)

With respect to Director Tobin's testimony, I do not find it credible that she first contacted Ms. Hutton about the alleged incident when Ms. Hutton credibly explained that no one asked her to provide or create her first written statement before she prepared one and slipped it under Director Tobin's door. (Tr. 59-60.) While Ms. Hutton believes she may have consulted the other charge nurse on duty that night whom she was training, Ms. Hutton was sure that she spoke to no one else before preparing her first written statement. (Id.) Moreover, I reject as non-credible and inconsistent with Ms. Hutton's credible recollection Director Tobin's description of any conversation she allegedly had with Ms. Hutton that led to Ms. Hutton's first written statement. Once again, Director Tobin's response to leading questions from Respondent's counsel that Ms. Hutton was somehow concerned about Mr. Bariuad's retaliating against her is simply an undocumented fabrication. Ms. Hutton readily admitted that she allowed Mr. Bariuad to occasionally sleep on the job and it was only the discovery and reporting of this by the other charge nurse she was training that led to the actions taken by Respondent against Mr. Bariuad.[14]

I also reject as untrue Director Tobin's testimony that CNA Burns was somehow "concerned again about confidentiality because she said she didn't want it to get back to the Union." (Tr. 102.) CNA Burns credibly explained that she did not express any concern about the confidentiality of her written statement and that, instead, Director Tobin spoke of it. (Tr. 50, 103.) More importantly, CNA Burns convincingly denied ever saying to Director Tobin or anyone else at Respondent that she was scared to put anything in writing that would cause repercussions from either Mr. Bariuad or the Union. (50-51.)

[14] Respondent argues that Ms. Hutton was afraid to report Mr. Bariuad's misconduct earlier but I find this to be speculative without record support. I find it more likely that Ms. Hutton and Mr. Bariuad were work colleagues and she simply allowed his work naps without any problems. Ms. Hutton only reported him when the new charge nurse in training blew the whistle and Ms. Hutton joined in and voluntarily submitted her own statement to avoid being disciplined more severely for ignoring Mr. Bariuad's alleged repeated misconduct.

In this case, witness credibility was pivotal in certain areas, and in particular was relevant to the events leading to Respondent's withholding of information related to the Witness Names and Witness Statements. In virtually all of the significant instances, reliable documentary evidence failed to support accounts provided by Respondent's key witnesses which weighs against such accounts being credible. For example, Mr. Bariuad's supervisor, Lynda Hutton, testified in vague terms that in addition to writing Mr. Bariuad up for sleeping on the job, she also wrote him up for verbal intimidation at the same time yet no such reference of verbal intimidation made it to the written statement prepared by Ms. Hutton and it is stipulated and I find that no such write-up was produced in response to a subpoena to Respondent seeking such documents.[15] (Tr. 71, 73-78.) Therefore, I do not find that Mr. Bariuad verbally intimidated Ms. Hutton at any time while employed by Respondent.

In addition, I found that portions of supervisor Lynda Hutton's testimony lacked credibility because she provided testimony, sometimes in response to leading questions from Respondent's counsel, which contradicted her earlier testimony and appeared non-credible as I observed her later testimony. As found above in Section D., Ms. Hutton's original testimony was that she was unaware of anyone at Respondent's facility who was threatened by Mr. Bariuad yet she later changed her testimony to say that she did actually experience intimidation or threats from Mr. Bariuad through his alleged statement that if she did anything to take Mr. Bariuad out of his employment with Respondent he supposedly threatened to "take [Ms. Hutton] out of here with me and everybody else" and that he also allegedly threatened Ms. Hutton with closing down Respondent's facility. (See Tr. 62-66, 75-76.) Unless otherwise noted, I generally credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence (including a lack of evidence documenting any alleged discipline or threatening conduct by Mr. Bariuad).

Similarly, I further reject Ms. Hutton's statements that she would have resigned out of fear of Mr. Bariuad and that she would not have prepared her first written statement about the incident involving Mr. Bariuad out of fear if Respondent had not led her to believe beforehand that the statement would be kept confidential. (Tr. 65-66.) This is inconsistent with her earlier testimony that Mr. Bariuad did not pose a threat at any time to anyone. (Tr. 62.) Furthermore, Ms. Hutton had difficulty recalling events, dates, who she spoke to, and what was said during certain allegedly important conversations, including those that she had with Mr. Bariuad and Director Tobin. (See Tr. 67-77.) I discount the veracity of her testimony when many times she would look directly at Respondent's trial representative Gayle Reynolds apparently for guidance or approval before remembering some fact in response to a question.

B. The Relevance of the Requested Information Is Not in Dispute

An employer must, upon request, provide a union with information, which is necessary and relevant to its representational role. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Relevancy is defined by a broad discovery standard, and it is only necessary to show that requested information has potential utility. (Id.) An employer must, for example, provide information connected to collective bargaining or contract administration. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

[15] When asked to locate where in her written statement Ms. Hutton wrote of Mr. Bariuad's alleged verbal intimidation, Ms. Hutton could only point to her statement that "[h]e accused me of thinking he wasn't doing his work." Tr. 74. I reject Ms. Hutton's strained interpretation that Mr. Bariuad's comment amounts to verbal intimidation.

Where the information is requested in connection with a grievance, as here, the Board's test for relevance remains liberal. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore's Federal Practice* that "it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy." 385 U.S. at 437 fn. 6, quoting 4 Moore, *Federal Practice* P26.16[1], 1175–1176 (2d ed.).

The failure to provide requested relevant information is a violation of Section 8(a)(5) of the Act.[16] Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Here the parties stipulate that the requested Witness Names and Witness Statements are presumptively relevant so there is no dispute on relevance grounds. (R Br. at 20.) I further find that the presumption has not been rebutted.

C. Confidentiality

Respondent asserts a confidentiality interest in protecting from disclosure the Witness Names and the Witness Statements.

1. The Witness Names

Even if requested information is relevant, however, in certain instances a party may assert a confidentiality defense to the demand for information. In two recent cases the Board has summarized the requirements of this defense. In *U.S. Postal Service*, 356 NLRB No. 75, slip op. at 4 (2011), the Board explained:

> A party asserting a confidentiality defense must prove a legitimate and substantial confidentiality interest in the information withheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." Id.

[16] In addition, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

In *A–1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 3 (2011), the Board stated:

> In considering union requests for relevant but assertedly confidential information, the Board balances the union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) [parallel citations omitted]. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining partner's need for the information. See *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (footnotes omitted).

In *Detroit Newspaper Agency,* 440 U.S. 301, the Board was clear that information accorded confidential status "is limited to a few general categories" as described above. In that case the Board rejected the employer's claim of a legitimate confidentiality interest in an internal safety audit report because it "falls outside these general categories."

More to the instant case, the Board held in *Transport of New Jersey*, 233 NLRB 694 (1977), that an employer's refusal to comply with a union's request for the names and addresses of passenger-witnesses to a bus accident, in the context of the employer's determination that the driver was at fault, violated Section 8(a)(5) and (1). And, in *Anheiser-Busch, Inc.*, 237 NLRB 982 (1978), citing *Transport of New Jersey*, the Board offered the following dictum:

> An employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined.

Id. at 984, fn. 5.[17] See also *Fairmont Hotel Co*., 304 NLRB No. 95 (1991)(Board affirmed ALJ decision finding Respondent violated Section 8(a)(5) and (1) by, among other things, failing to disclose the identities of the employee-witnesses for some 3 months after the union first requested them.)

Notwithstanding this approach, the Board has held, in reference to the *Detroit Newspaper Agency* formulation, that "this description of confidential information is not intended to be exhaustive." *Northern Indiana Public Service, Co*., 347 NLRB 210 (2006), (*NIPSCO).* Rather the Board has "considered whether the information was sensitive or confidential within the factual context of each case." Id. In particular, the Board has recognized, at least in some contexts, the existence of a valid confidentiality interest for employees' reporting to management on the misconduct of other employees. The recognition of a confidentiality interest in the identity of informants turns on some combination of the importance of encouraging employees to report the issue to management in terms of employee or public safety, the illegality of and/or threat posed by the underlying conduct, the potential involvement of illegal drugs, and concerns about physical or other retaliation against the informants. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107 (1991) (legitimate interest in keeping names of informants confidential where employer was engaged in investigation of criminal drug

[17] Contrary to Charging Party's assertion that this footnote was the holding in *Anheiser Busch*, it is simply dictum. See CP Br. 1.

activity with potential for harassment of informants); *Mobil Oil Corp.*, 303 NLRB 780, 780–781 (1991); *See Metropolitan Edison Co.*, 330 NLRB 107, 107–108 (1999) (assuming legitimate interest in confidentiality of informants' names providing information on workplace theft).

In this case, the information sought to be protected is not highly personal, proprietary, or traditionally privileged. And there is no credible record evidence of fear by employees of retaliation or physical threat from Mr. Bariuad or the Union if they were identified. See *Metropolitan Edison*, 330 NLRB at 108 (While it "would be naïve to deny any latent possibility of retaliation against informants whose information leads to an investigation and discharge of an employee, . . . this case presents no more than just that—a possibility. There is nothing in this record to indicate a likelihood or real risk of retaliation or violence."). Moreover, I find that Respondent maintains a blanket policy of keeping *all* witness names confidential regardless of need or subject matter.

For the same reasons articulated by my colleague, Administrative Law Judge David L. Goldman, in his decision styled *Alcan Rolled Products – Ravenswood, LLC*, affirmed by the Board at 358 NLRB No. 11 (February 27, 2012), I also reject any suggestion that the mere desire to ensure that employees talk more freely to management somehow establishes a legitimate confidentiality interest. Similarly, I reject the suggestion that a confidentiality interest is established in the identities of employees and their job titles by Director Tobin's assurances to employees that their discussions with her—on nearly any subject – are confidential should they want them to be. See *Alcan Rolled Products*, 358 NLRB No. 11 at 7, fn 10.

Furthermore, I reject Respondent's argument that the Union could easily have discovered the names and job titles of the witnesses to Mr. Bariuad's incident in June by simply viewing the "monthly" employee work schedule postings at Respondent. (See R Br. 7, 20.) Contrary to Respondent's assertions, work schedules were not posted for a month but, instead, are posted for no longer than two weeks and when the two weeks expired - they were pulled and replaced by a new two week schedule. (Tr. 92-93.) Besides supporting the fact that the Witness Names were not confidential because they were posted, the postings may or may not have included employee job titles. It is unreasonable to expect the Union to be immediately aware of the temporary postings and to anticipate Respondent's eventual refusal to produce the Witness Names before its initial June 17 refusal response. Moreover, because various witnesses denied to the Union's inquiry that they prepared witness statements, it is reasonable for the Union to look to Respondent to supply the names as the statements could have come just as well from unidentified residents at the facility. More importantly, there is no duty on the Union to obtain the requested information on its own just because it had the fleeting ability to do so. Instead, a union's ability to obtain requested information elsewhere does not excuse an employer's obligation to provide the requested information. *King Soopers, Inc*. 344 NLRB 842, 845 (2005).

Also, I reject Respondent's argument that the issue related to production of the Witness Names has become moot by the identifying testimony in the course of trial in this matter more than a half year after the Union first requested them.[18]

While there may be a significant and legitimate interest in Respondent encouraging employees to report other employees who may be acting in ways that endanger themselves, their co-employees, or the facility as, for example, where an intensive care nurse is found

[18] Belated compliance does not exonerate. *Interstate Food Processing*, 283 NLRB 303, 306 (1987).

asleep while the sole caregiver of the unit, there is no credible evidence in this case that Mr. Bariuad endangered anyone. In fact, Ms. Hutton, his supervisor at the time, convincingly opined that Mr. Bariuad's alleged misconduct did not pose a danger to anyone given the excess staffing during the night in question. See Tr. 68-69. Therefore the specific facts and circumstances here are distinguishable from the facts in the cases cited by Respondent such as the *Pennsylvania Power,* 301 NLRB 1104 (1991), *Alcan Rolled Products, supra, ,* and *NIPSCO*, 347 NLRB 210 (2006) [19], cases with facts involving unsafe conduct and concerns of substance abuse at a nuclear power plant and criminal conduct not present in this case. Moreover, this case does not present credible evidence of any fear of safety or concern of retribution. Respondent has not proven any "clear and present danger" of harassment. See *Diamond Walnut Growers*, 312 NLRB 61 (1993), enforced, 53 F.3d 1085 (9th Cir. 1995). See also *Page Litho, Inc*., 311 NLRB 881 (1993) (Ordering disclosure of striker replacement information reaffirming "clear and present danger" test, and finding that employer's alleged fear of harassment was no longer reasonable nearly 4 months after strike ended and last reported incidents of harassment had occurred). Finally, there is no credible evidence that the witnesses requested anonymity or that Respondent ever promised confidentiality as to the *identities and job titles* of the witnesses who prepared statements.

Given the specific facts in this case, and the Board precedent, I find that the Respondent has not proven a legitimate and substantial interest in preserving the confidentiality of the names and job titles of the employees who complained to management about their perception of Mr. Bariuad's alleged misconduct which did not involve unsafe conduct, criminal activity, threats or harassment. Because I find there is no legitimacy of the Respondent's claimed confidentiality interest in the employees' names and job titles, I further find that the requested names and job titles must be produced and that no accommodation in its place is necessary. I therefore conclude that the Respondent violated Section 8(a)(5) and (1) by refusing to provide to the Union the names and job titles of the informants against Mr. Arturo Bariuad.

2. The Witness Statements

We turn now to the Witness Statements requested by the Union in this case. As with the Witness Names, I find there is no dispute that the Witness Statements are relevant to the Union's processing of Mr. Bariuad's grievance. Once again, the issue is whether the Witness Statements are to be produced or are they protected on confidentiality or privilege grounds.

As stated above, generalized contentions that information is confidential or privileged because of business needs are usually rejected and the party asserting confidentiality has the burden of proof. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485 (7th Cir. 1942); *U.S. Postal Service*, 289 NLRB 942 (1988), enforced, 888 F.2d 1568 (11th Cir. 1989). Information prepared in anticipation of litigation may be confidential. *Central Telephone*, 343 NLRB No. 99, 174 NLRB 1488 (2004). In *New Jersey Bell Telephone Co*., 300 NLRB 42 (1990), enforced, 936 F.2d 144 (3d Cir. 1991), the Board reaffirmed but found inapposite its rule of *Anheiser-Busch, Inc*., 237 NLRB 982 (1978), that an employer need not furnish the union with witness statements for grievance proceedings. Id. at 43.

The Board in *Anheiser Busch*, 237 NLRB 982, 984-85 (1978), held, after discussing some of the specific facts present in the case:

[19] In *NIPSCO*, the *names* of the interviewee witnesses were freely produced by the employer and the dispute in that case was over the production of interview notes taken by the employer in the course of its investigation of an employee's threatening conduct.

> In any event, without regard to the particular facts of this case, we hold that the "general obligation" to honor requests for information, as set forth in [*NLRB v.*] *Acme* [*Industrial Co.*, 385 U.S. 432 (1967)] and related cases, does not encompass the duty to furnish witness statements themselves.

The Board in *Anheiser-Busch* went out of its way to say that the privilege rule it was creating was not fact-driven and the Board did not distinguish between witness statements that are produced under a blanket policy of confidentiality with no evidence of intimidation or harassment present and those witness statements prepared in an environment of employee intimidation, harassment, or cases involving issues of public or employee safety, drug abuse, or dangerous working conditions. See i.e., *Fleming Companies, Inc*., 232 NLRB1086, 1088-90 (2000)(Concurring opinion).

General Counsel concedes that as for the witness statements provided by CNA Burns and the unnamed LVN charge nurse, Respondent's Witness Statements were properly withheld pursuant to the rule of law under the *Anheiser-Busch* case, which generally privileges Respondent from disclosing them to the Union. (GC Br. 12.) First of all, I also find that Ms. Hutton's witness statement also falls under the *Anheiser-Bush* case rule as Ms. Hutton believed that her witness statement would remain confidential under Respondent's blanket policy that all witness statements would remain confidential and would not be produced in response to a relevant information request. In addition, the Board, in *Anheiser Busch*, did not distinguish between witness statements provided by employees or supervisors, so I do not agree with Acting General Counsel's argument that Ms. Hutton's and the unidentified LVN charge nurse's witness statements should be produced due to their supervisory roles.

Secondly, as to the Witness Statements, the General Counsel contends that the rule of privilege against producing witness statements set forth in *Anheiser-Busch* is somehow "arcane" or has become outdated, and should be overturned by me and replaced with the balancing of interests test from *Detroit Edison* referenced in Section C.1. above. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board. Because the four Witness Statements at issue were submitted by the employee writers with expectations of confidentiality, applying *Anheiser-Busch,* I find that Respondent's refusal to produce these Witness Statements does not violate Section 8(a)(1) and (5). I therefore recommend dismissal of Paragraphs 7 and 8 of the complaint as to the requests for information concerning the Witness Statements.

Finally, Acting General Counsel argues that even if Respondent is privileged from disclosing the Witness Statements to the Union, "an employer must still provide a union with a summary of witness statements." (GC Br. 22.) While conceding that Respondent offered to supply the Union these summaries, Acting General Counsel argues that Respondent "failed to fulfill that offer" and has violated Section 8(a)(5) and (1) of the Act by such failure. (Id.)

I find that Respondent did, in fact, offer to bargain with the Union by offering to produce the witness statement summaries to the Union. It is undisputed that the Union never responded in an accepting manner or accepted this offer at any time. I further find that the Union's duty was to make an effort to bargain with Respondent as it had done earlier and outwardly accept the offer or submit a counter-proposal rather than sitting on its hands and simply proceeding to trial. Even during trial, the Union confirmed its rejection of Respondent's offer to provide it with witness statement summaries. (Tr. 36-37.) As a result, I find that Respondent has not violated Section 8(a)(5) and (1) of the Act for not producing the witness statement summaries rejected by the Union.

CONCLUSIONS OF LAW

1. Respondent American Baptist Homes of the West d/b/a Piedmont Gardens is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union Service Employees International Union, United Healthcare Workers-West is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union, in and after June 2011, with the names and job titles of the informants against Mr. Arturo Bariuad, Respondent violated Section 8(a)(5) and (1) of the Act.

4. Respondent's above-described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Unless specifically found above, Respondent engaged in no other unfair labor practices.

Remedy

Having found that Respondent has engaged in, and continues to engage in, serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to engage in certain affirmative acts. As I have found that Respondent has unlawfully failed and refused to provide the Union with the names and job titles of informants against Mr. Arturo Bariuad, I shall recommend that it be ordered to do so. In addition, I shall recommend that it be ordered to post a notice, setting forth its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[20]

ORDER

The Respondent, **American Baptist Homes of the West d/b/a Piedmont Gardens**, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Union with the requested names and job titles of informants against Mr. Arturo Bariuad, which information is presumptively relevant;

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the requested names and job titles of informants against Mr. Arturo Bariuad;

(b) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2010;

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply; and

(d) Within 14 days of the date of this order, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice will be publicly read by the responsible corporate executive, Gayle Reynolds, executive director, in the presence of a Board agent, or at Respondent's option, by a Board agent in Reynolds' presence. This remedy is appropriate here because the Respondent's violations of the Act are a repeat of another failure to produce information and are sufficiently serious that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. See *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., April 16, 2012.

Gerald M. Etchingham
Administrative Law Judge

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to furnish the Union with the requested names and job titles of informants against Mr. Arturo Bariuad, which information is presumptively relevant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the requested names and job titles of informants against Mr. Arturo Bariuad.

American Baptist Homes of the West d/b/a Piedmont Gardens

(Employer)

Dated _____ By _____

Ms. Gayle Reynolds, Executive Director

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N

Oakland, California 94612-5211

Hours: 8:30 a.m. to 5 p.m.

510-637-3300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3270.